

No. 16,405 ✓

United States Court of Appeals
For the Ninth Circuit

TRAVIS BUFORD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

MORRIS OPPENHEIM,

Phelan Building, San Francisco 2, California,

ARTHUR D. KLANG,

333 Kearny Street, San Francisco 8, California,

Attorneys for Appellant.

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**United States Court of Appeals
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TRAVIS BUFORD,

Appellant,

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APPELLANT'S OPENING BRIEF.

**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING JURISDICTION OF THE DISTRICT COURT AND OF
THIS COURT HEREIN.**

An indictment was presented by the Grand Jury of the Northern District of California against appellant and Teresa Turner.

Count I charges that Teresa Turner and appellant, on or about the 30th day of July, 1958, in the City and County of San Francisco, and Northern District of California, did unlawfully sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a narcotic drug, to-wit, approximately 7 grains of cocaine hydrochloride, in violation of Title 26, U.S.C., Sections 4704 and 7237.

The second count charges appellant alone, on or about the 4th day of August, 1958 in San Francisco,

Northern District of California, did unlawfully sell, dispense and distribute, not in and from the original stamped package, a certain quantity of a narcotic drug, to-wit, approximately 5 grains of cocaine hydrochloride, in violation of Title 26, U.S.C., Sections 4704 and 7237.

The third count charges Teresa Turner and appellant with having wilfully, knowingly, and unlawfully, conspired together and with other persons unknown to the Grand Jury, at a time unknown to the Grand Jury, in the State and Northern District of California, to commit an offense against the United States in violation of Section 4704 of Title 26, United States Code.

That the object of the said conspiracy was to unlawfully sell, dispense, and distribute, not in and from the original stamped package, a certain quantity of a narcotic drug, to-wit, cocaine hydrochloride.

That in pursuance to said conspiracy and to effect the object thereof, the defendants hereinafter named did the following overt acts:

1. On July 30, 1958 appellant did deliver a package of cocaine within the premises located at 1503 Ellis Street, San Francisco, California.

2. On July 30, 1958 Teresa Turner and appellant had a conversation within the premises located at 1503 Ellis Street, San Francisco, California.

3. On July 30, 1958 appellant received the sum of Forty (\$40) Dollars upon the premises located at 1503 Ellis Street, San Francisco, California. (Tr. 3.)

To each of the three counts, appellant pleaded "Not Guilty" (Tr. 11, Judgment).*

Trial by jury was waived (Tr. 10) and the cause came on for trial before the Court, sitting without a jury, Hon. Michael J. Roche, judge, on January 26, 1959. (Tr. 15.)

Prior to the trial the defendants moved for an order directing the government to produce reports and documents for inspection (Tr. 6), and which motion the Court denied without prejudice to renewal at time of trial. (Tr. 9.)

Upon the trial, at the conclusion of the government's case, defendants made a motion for a judgment of acquittal, which motion the Court denied. (Tr. 10.)

Defendants, at the conclusion of the trial and after having been found guilty by the Court (Tr. 11) moved for a new trial, which motions were also denied by the Court. (Tr. 11.)

On February 9, 1959, after having been theretofore found guilty of violations of Title 26, U.S.C., Sections 4704 and 7237 (sell, dispense and distribute a narcotic drug); Title 18, Section 371 (conspiracy); the Court sentenced appellant to serve two years imprisonment, on each count, but the imprisonment on all counts to run concurrently with each other, and to pay a fine of Five Hundred and No/100 (\$500.00)

*Teresa Turner was also convicted and sentenced on the first and third counts of the indictment, but she did not file any appeal, consequently this brief is on behalf of appellant alone.

Dollars on each count, total fine Fifteen Hundred and No/100 (\$1500.00) Dollars. (Tr. 12.)

Notice of appeal was filed by appellant on February 17, 1959. (Tr. 13.)

JURISDICTIONAL STATEMENT.

**A. THE STATUTORY PROVISIONS BELIEVED TO
SUSTAIN THE JURISDICTION.**

(1) The Jurisdiction of the District Court.

Amendment VI to the Constitution of the United States provides:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed.”

Section 3231 of Title 18 of the United States Code provides:

“The District Courts shall have original jurisdiction, exclusive of the Courts of the States, of all offenses against the Laws of the United States.”

(2) The Jurisdiction of this Court Upon Appeal to Review the Judgment in Question.

Section 1294 of Title 28 United States Code provides:

“Appeals from reviewable decisions of the District and Territorial Courts shall be taken to the Courts of Appeal as follows:

(1) From a District Court of the United States to a Court of Appeals for the Circuit embracing the District.”

(2) Section 1291 of Title 28, United States Code provides:

“the Courts of Appeal shall have jurisdiction of Appeals from all final decisions of the District Courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”

**B. THE PLEADINGS NECESSARY TO SHOW THE
EXISTENCE OF THE JURISDICTIONS.**

The indictment (Tr. 3-5) pleas of not guilty to each count entered by defendant. (See Recitation in Judgment, Tr. 11.)

**C. THE FACTS DISCLOSING THE BASIS UPON WHICH IT IS
CONTENDED THAT THE DISTRICT COURT HAS JURISDICTION
AND THAT THIS COURT HAS JURISDICTION UPON
APPEAL TO REVIEW THE JUDGMENT IN QUESTION.**

Reference is respectfully made to the commencement of this brief, where the facts with respect to the indictment, plea, judgment, and orders are set forth.

STATEMENT OF THE CASE.

Herein is summarized briefly, but as accurately as possible, the evidence adduced at the trial, upon which the conviction is based.

On July 30, 1958, an informer, Malvina Webb (the transcript incorrectly named her as Malvino) was equipped with a Schmidt transmitter (described as a radio transmitter) concealed in her purse and taken to a barber shop at 1503 Ellis Street. Prior to this the transmitter had been tested to determine if it was being received on the agent's receiver in a government automobile parked nearby. Prior to going to the barber shop Malvina Webb was searched at the Central Emergency Hospital in San Francisco by a doctor and a nurse. At 3:00 p.m. a government automobile was parked on Ellis Street, between Webster and Hollis, about a half-block away from the barber shop at 1503 Ellis Street, and the informer entered the barber shop, while the agent testifying (Theodore J. Yannello) remained in the vehicle. The agent had heard the informer's voice over the transmitter while testing the device. He heard the informer's voice coming over the transmitter while she was in the barber shop, which said: "Hi, Travis, Honey." There was a pause, then the informer said: "I have \$40.00 and I'd like to have some of the action we talked about." (Tr. 32.) Another voice said: "All right, be by at 6:30 and it will be all set." The informer had been given \$40.00 by the agent. The informer remained in the barber shop about five minutes, and when she came back to the agent, she was taken to the hospital to be searched, and there was no money. About 6:30 or 6:40 that evening the informer was again taken to the hospital to be searched, and then was again taken to the vicinity of the barber

shop; she was again equipped with the transmitter, and she entered the barber shop. The officer remained outside till she entered, and he then went in the automobile. Another officer, state agent William G. Walker, and other officers were in the immediate vicinity. At about 7:00 o'clock that evening Walker saw Malvina Webb enter the barber shop while he was fifty or seventy-five yards behind her. He walked by and saw the informer in the barber shop. He also saw the defendants in the shop. The informer was standing at the foot of the first chair while appellant was working on someone. The officer heard appellant say: "I'll be with you in just a minute, just as soon as I finish this process job." He saw the defendant, Teresa Turner in the barber shop, further back. About ten or fifteen minutes after her entry, he saw the informer leave. There were probably five or six other persons in the barber shop as he passed by, and the shop was wide open. (Tr. 44.) This was the first time he had ever heard appellant's voice, and had never heard her voice over a Schmidt transmitter, and does not know if any other persons in the shop used their voice. Yannello, who had been withdrawn as a witness to permit Walker to testify resumed the stand and testified: At 7:00 p.m. he heard the informer say "Hi", or something like that; then heard a voice say, "I'll be with you in a moment, as soon as I get through with this process job." "I've got you two \$20.00 papers." (Tr. 57.) The witness later changed this testimony to be he heard a voice say, "I got you two \$20.00 papers and I want to taste

some of it." The informer said, "All right." He then heard a knock and the informer said: "Teresa, get your black fanny away from here—you always want some for free." A voice answered: "If you don't let me in and give me some, I'm going to tell your old man what you're doing." The informer said: "All right, come on in"—then said, "Teresa, don't take it all. If you do, I'll end up with the papers and no coc." Then the informer said: "I'll be by tomorrow and make a little bigger buy, is that all right?" And that voice answered, "Fine." She said "if my store hasn't run out of stuff you can pick it up. And today." She says "when the connection came by I wasn't in the barber shop; so, he gave the stuff to Teresa, and she gave it to me when I came back." Then the informer left the barber shop; came to the car, entered the car and handed the officer the package marked "Exhibit No. 1". (Tr. 59-60.)

On August 4, 1958 Malvina Webb was again searched at the hospital and furnished with \$100.00 in government funds. The transmitter was again tested, and the informer went into the barber shop at 7:00 p.m. She remained about a half hour. She left the area and again returned and entered the barber shop, remaining a half hour, and emerged about 9:00 p.m. and went her own way.

About 8:10 or 8:15 p.m. on August 4th, Agent Walker saw appellant leave the barber shop, and return about a half hour later. He saw the informer enter the shop the third time about 8:30 and leave about 9:00 p.m.

Agent Hipkins testified that on August 4th, while in the government automobile, at about 7:00 p.m. he heard the informer's voice over the transmitting device, say: "Travis, I want to get two spoons of coc." A female voice replied: "I will have to call my connection and place the order." At about 8:50 p.m. he heard the same voice that he had heard earlier that evening say: "Here's the stuff." He later changed this conversation (Tr. 75) to be "Here's the stuff, but be careful. It is more powerful than the last stuff and I want to take a snort before you go." Shortly thereafter he saw the informer walking south on Webster Street. He followed her to a point on Golden Gate between Webster and Buchanan, at which point he picked her up in a car and she handed him the two pink paper bindles. (Exhibit No. 2.) Neither exhibits 1 or 2 contained revenue stamps and the chemist testified they both contained cocaine.

Agent Yannello arrested both defendants on August 7, 1958, on which date he talked with them in the Federal Office Building. He told the defendant (?) that they were under arrest for violation of the Federal Narcotic Laws (Tr. 64) and said: "Just to show that we know what we are talking about, I'm going to tell you what happened on July the 30th. We had an informer go in your shop, in the beauty salon at 1503 Ellis." "At 3 o'clock she went in and made an order and you told her to come back at 6:30 that night." "She came back in at 7:00 and you took her to a little back room and you gave her two \$20.00 papers; that you wanted to taste the narcotics your-

self." "You did." "While you were tasting it, your sister, Teresa, wanted some of it and was told to go away by the special employee." "She said that if they didn't let her in and give her some, she was going to tell the special employee's old man what she was doing." "She came in and took a taste and you told the special employee that she could come back by tomorrow and make another purchase." "That particular July 30th when the connection was to come by with the narcotics you weren't in the barber shop, so he gave it to your sister, Teresa, and she in turn gave it to you when you came back." Buford said: "That is exactly what happened." "How do you know that?"

The agent said: "When we sent our special employee in she had on a transmitter so we could hear everything that happened in that barber shop."

The officers told them that they wished their services in apprehending their source of supply, and defendant Turner said: "By golly, she said she was going to work for you and give you the source of supply and anybody else that she knows that is dealing in narcotics," and she said, "You call me and I will make sure she goes to work for you."

On the occasion of the arrest of defendants on August 7th, they were not booked. (Tr. 84.) They were actually booked on August 26th, twenty-two days after the conversation referred to as having been heard over the transmitter on August 4th. (Tr. 84.)

ARGUMENT.

I. THERE HAS BEEN NO ILLEGAL CONSPIRACY PROVED.

If in fact any conspiracy has been shown—and appellant does not concede this, although she assumes it only for the purposes of this argument, it had to include the informer, or there was no conspiracy at all. Since this was a feigned agreement made and contrived by the government, the informer being an agent of the government, her participation cannot be charged to appellant. Without her participation there was no occasion for an agreement to perform certain acts. The whole purpose of the arrangement entered into by Malvina Webb was to entrap appellant into selling or furnishing narcotics, and thus giving cause to arrest appellant.

It has been held that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.

United States v. Katz, 271 U.S. 354, 70 L.Ed. 986, 46 S.Ct. 513 Aff'g (D.C.) 5 Fed (2d) 527;

Gebardi v. United States, 287 U.S. 112, 77 L.Ed. 206, 53 S.Ct. 35, 84 A.L.R. 370;

United States v. Zevli, (C.A. 2d) 137 Fed. (2d) 845;

People v. Keyes, (Cal.) 284 Pac. 1105;

People v. Wettengol, 98 Colo. 193, 58 Pac. (2d) 279, 104 A.L.R. 1423;

United States v. Dietrich, (C.C.) 126 Fed. 664, 666;

Bracco v. U. S., (C.C.A. 6) 117 Fed. (2d) 858.

Since the indictment charges a conspiracy to sell, distribute and dispense narcotics (Tr. 4) the foregoing principle of law is applicable, as no sale could be executed without both a purchaser or receiver, and seller or dispenser.

It is the law that the acts, statements or declarations of a decoy or feigned accomplice, may not be charged to the principal or co-conspirator.

Williams v. State, 55 Ga. 391;

Price v. People, 109 Ill. 109;

People v. Goldberg, 152 Cal. App. (2d) 562, 314 Pac. (2d) 151 at 158.

II. THE EVIDENCE OF THE TWO SUBSTANTIVE COUNTS IS INSUFFICIENT.

The government informer and operative was not in Court, and did not testify. Instead, the government agents gave testimony of her activities and conversations which they were able to see and hear. None of her acts or conversation were chargeable to appellant.

Williams v. State (supra), 55 Ga. 391;

Price v. People (supra), 109 Ill. 109;

People v. Goldberg (supra), 152 Cal. App. (2d) 562, 314 Pac. (2d) 151 at 158.

The only purpose this testimony by the government agents had, was to give meaning to the acts and

remarks of appellant, if indeed any such acts and remarks were proved. Appellant earnestly contends there was no such proof. The first remark attributed to appellant in the evidence was: "All right, be by at 6:30 and it will be all set." (Tr. 32.) Agent Yannello did not identify the voice that made that statement. (Tr. 32.) Nor did any other witness. At 7:00 p.m. that night this same witness claims to have heard over the Schmidt transmitter, the same voice say: "I'll be with you in a moment, as soon as I get through with this process job." He still was unable to identify this voice. However, another witness, state agent William G. Walker, claims that at the same time, as he was passing by the barber shop, he heard the appellant use nearly these same words. (Tr. 43.) On cross-examination he said there were 5 or 6 persons in the shop at that time. He was looking through the window when he saw appellant's lips move, but even though the door to the shop was open, he turned his head towards the street as he passed the open door. (Tr. 44.) Also he does not know whether any of the other persons in the shop used their voice. (Tr. 45.) Agent Yannello, resuming the stand, attributed to the same voice some conversation concerning two \$20.00 papers. Then he heard a knock, intimating the persons were in the back of the shop then, and some further conversation with one Teresa (Tr. 59) and then some remarks about what one of the participants in the conversation could do the following day. (Tr. 60.) Agent Yannello testified that on August 7th, when he had first arrested appellant, at his office,

she told him that it was her voice he had first heard at 3:00 p.m. on July 30th say: "All right, be by at 6:30 and it will be all set."

He now claims that from these short words he was able to say the voice was the same on the subsequent conversations to which he testified. Of course, appellant claims that since he was unable to identify the utterer on this occasion, he still cannot identify the utterer on the subsequent occasions.

It is important to remember that appellant was never shown to possess or handle narcotics, or to possess or handle any of the government money.

To emphasize, the only identification of appellant with the alleged crimes is Agent Yannello's statement that appellant admitted "That is exactly what happened" when he told her about the events on July 30th (Tr. 64-65); and Agent Walker's testimony that he heard appellant say: "I'll be with you in a moment, as soon as I get through with this process job."

None of these conversations were recorded, although they could have been. (Tr. 83-84.)

There is a stipulation that the informer was searched, but no stipulation or evidence that the search revealed she had no narcotics. (See Tr. 87.)

Under the circumstances, the proof that she obtained the narcotics from appellant, as alleged in the indictment, is still more nebulous.

Appellant believes the law as it applies to telephone conversations is the same as it applies to conversations

over the Schmidt transmitter. The contents of a telephone conversation are admissible only if the identity of the person with whom the witness was speaking was satisfactorily established. If there is no identification, proof of the conversation must be excluded.

Lewis v. United States, (C.A. 1st) 295 Fed. 441 cert. den., 265 U.S. 594, 68 L.Ed. 1197, 44 S.Ct. 636;

Lewis v. United States, (C.A. 6th) 11 Fed. (2d) 745;

Van Riper v. United States, (C.A. 2d) 13 Fed. (2d) 961, cert. den., 273 U.S. 702, 71 L.Ed. 848, 47 S.Ct. 102;

Merritt v. United States, (C.A. 9th) 264 Fed. 870, rev'd on confession of error, 255 U.S. 579, 65 L.Ed. 795, 41 S.Ct. 375.

The law that a crime may not be proved by the words that come out of the mouth of the defendant in an extrajudicial admission, is so well known, that appellant believes it would be presumptuous and far from flattering to this Honorable Court to cite cases for this well known principle of law.

19 *Cal. Jur.* (2d) 182, 183.

III. ERRORS OF LAW IN THE ADMISSIBILITY OF EVIDENCE.

Objection was first made by appellant when officer Yannello testified to the conversation alleged to have been heard by him over the Schmidt transmitter, on the ground of hearsay because he could not identify

appellant's voice. (Tr. 31.) Further objections on the same ground were made at Tr. 34, 56, 57, 72, 73, 74. All of these objections were overruled.

Appellant objected to the receipt in evidence of the narcotics alleged to have been sold by appellant to the government decoy on the ground they have not been identified with her. (Tr. 86.) The objection was overruled at Tr. 94.

IV. THE MOTIONS FOR ACQUITTAL AND FOR NEW TRIAL WERE ERRONEOUSLY DENIED.

These motions were made as indicated at Tr. 86, 94, at the conclusion of the government's case. The motion was renewed after appellant was convicted. (Tr. 102.) Motion for a new trial was made also after conviction. All motions were made on substantially the same grounds, to-wit: That the narcotics were not identified with appellant, and the Court erroneously received evidence of the conversations over the Schmidt transmitter, without sufficient identification of appellant's voice. All motions were denied. (Tr. 97, 98, 102.)

CONCLUSION.

In conclusion, appellant urges that the evidence against her in counts I and II, while under the law there could be no criminal conspiracy at all, was so nebulous that the trial judge inquired of the United States attorney (Tr. 95), "Has this been proven?"

While it would be hazardous to speculate on the judge's reasons for his change of mind later, when he denied the motion for acquittal (Tr. 97), there appears to appellant to be no alternative for this Court, but to reverse the judgment, particularly the order denying the motion for acquittal. The well known and revered doctrine of the presumption of innocence should unerringly lead to this result.

Dated, San Francisco, California,
May 25, 1959.

Respectfully submitted,

MORRIS OPPENHEIM,

ARTHUR D. KLANG,

By ARTHUR D. KLANG,

Attorneys for Appellant.

(Appendix A Follows.)

Appendix "A"

Appendix A

INDEX OF EXHIBITS IN RECORD

Plaintiff's Exhibits No.	Description	Page Identified	Page Offered	Page Received
1	2 Bindles cocaine	19	86	94
2	2 Pink bindles cocaine	20	86	94

